

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
complainant	:	
v	:	C-2015-2464291
Capital City Cab Service,	:	
respondent	:	

REPLY EXCEPTIONS OF CAPITAL CITY CAB SERVICE

Capital City Cab Service (Capital City), through its attorney, Joseph T. Sucec, Esq., hereby files these Reply Exceptions to those of the Bureau of Investigation and Enforcement as follows:

I INTRODUCTION

Respondent was/is the target of a Commission Complaint based on the actions of its contractee driver Saleh Elazouni, which were alleged to be in violation of **52 Pa. Code 29.313(a)**, which, in turn, states:

**§ 29.313. Service standards and requirements.**

(a) *Required to provide service.* A driver of a call or demand vehicle shall, at all times when on duty and not engaged, furnish trip service on demand to an orderly person for

lawful purposes.

At approximately 11:35 pm on January 25, 2015, prospective passenger David DeKok and a minor child approached Elazouni, fourth and last among cabs in line at the Harrisburg Transportation Center, with the intent of procuring a ride to the Shipoke neighborhood, adjacent to downtown Harrisburg.(Hearing Transcript 8-9), After Elazouni told DeKok that another passenger had already hailed him (HT 35), DeKok became belligerent, and took two photographs, at close range, detailing the identity/number of the cab and the company (BIE Exhibit 1).

At hearing March 28, 2016, The Bureau of Investigation and Enforcement (BIE) presented two witnesses: DeKok, and Bureau Enforcement Officer Timothy Troxell, who primarily testified that he took the complaint (HT 14 et seq). The BIE also entered into evidence the aforementioned photographs. On July 11, 2016, Administrative Law Judge Steven K. Haas rendered his Initial Decision finding Respondent not in violation. On August 25, 2016 (according to the accompanying Secretarial Letter), some 45 days after said Initial Decision, the BIE filed its Exceptions to the Judge's Decision. Complainant filed no nunc pro tunc Petition nor anything else explaining the lateness of the filing. Capital City files these reply exceptions on September 6, 2016, timely according to **52 Pa Code 5.535** (The next business day after a weekend/holiday during

which the 10th day falls).

## II TIMING OF THE BIE'S EXCEPTIONS

**52 Pa. Code 5.533** governs the Exceptions process regarding ALJ decisions. The time limits therein are clear:

### **§ 5.533. Procedure to except to initial, tentative and recommended decisions.**

(a) In a proceeding, exceptions may be filed by a party and served within 20 days after the initial, tentative or recommended decision is issued unless some other exception period is provided. Exceptions may not be filed with respect to an interlocutory decision.

The Initial Decision was rendered on July 11, 2016. Complainant's Exceptions were filed either on August 23, 2016 (based on the date on the Exceptions) or August 25, 2016 (based on the date of the attached Secretarial Letter). By any calculation, including the exclusion of weekends and holidays, the time the BIE seeks to allot itself is more than double that prescribed by the regulation. The BIE's Exceptions should be struck in their entirety as untimely.

## III SCOPE OF REVIEW

The BIE attempts to mislead the Commission in citing G. G. C. Bus Co. v. Pennsylvania Public Utility Commission, 42 Pa. Commw. 384, 400 A.2d 941 (1979), suggesting arbitrary and unlimited de novo review powers on the part of the Commission regarding Administrative Law Judge-rendered Initial Decisions. The BIE seeks to render the Administrative Hearing process impotent, throwing any matter (with which it disagrees) into a hearing of the Commission, where Respondent's Due Process is limited to the present Exceptions process. The BIE decrees, and both the assigned ALJ and the Commission must ratify.

Except that Pennsylvania law, as well as administrative law throughout the United States, works somewhat differently. The Commission may exercise all the broad powers suggested by the Complainant, **if “substantial evidence” exists to support such an exercise.** Pa. Retailers Assn., et al v. PUC, 440 A 2d 1267, 1272 (Pa Cmwlth 1982)

Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). A case from over a century ago, ICC v. Louisville & Nashville Railroad, 227 U.S. 88 (1913), established the standard against arbitrary rulings, holding that "[a] finding without evidence is arbitrary and baseless .... A finding

without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must... be set aside by a court of competent jurisdiction.”

Similarly, “Evidence is substantial when relevant and of a nature that a reasonable mind might accept as adequate to support a conclusion.” **Lancaster County v. Pennsylvania Labor Relations Board, 82 A.3d 1098, 1109-10 (Pa. Cmwlth. 2013)**

#### IV REPLY EXCEPTIONS (to Exceptions 1-2)

The BIE filed two exceptions that essentially make the same claim; that the ALJ failed to give proper weight to the testimony and exhibits presented at the March 28 hearing. As such, Respondent will Reply to both here.

As cited in the Initial Decision at page 4, A preponderance of evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. **Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854, 1950 Pa. LEXIS 316 (1950)**

The BIE relies heavily on photographic evidence, taken at near point-blank range, that

alleges (apparently based on an after-the-hearing epiphany) that Elazouni was not, as he stated at the March 28 hearing (HT 35), loading a passenger on the other side of his vehicle. Yet DeKok's own testimony (HT 10) admits that, **immediately** after said photos were taken, Elazouni was boarded by other passengers. DeKok also admits that (HT 10), regardless of “who was first,” Elazouni attempted to accommodate him anyway, but DeKok refused. The passenger(s) Elazouni ultimately carried could have been approaching or in conversation with Elazouni prior to DeKok's approach; none of this can be either proven or disproven by the close range photos Complainant attempts to use to make its case.

The BIE's Exceptions also make much of the ALJ's “attempts to shift the burden” away from Respondent. If the ALJ did so in the Initial Decision, such a finding is de minimis to the result here; the matter simply devolves into whom the ALJ found more credible. The photographs introduced by Complainant show nothing but the identity of the cab, company and driver; all freely admitted by Respondent. The citation by Complainant of Elazouni's log sheet (Exceptions at 3, BIE Exhibit 2), which alleges a five-minute discrepancy between the also alleged 11:35 pm incident time and Elazouni's recording of his pickup at the Transportation Center, is also de minimis; the incident between DeKok and Elazouni likely required several minutes by itself, watches/clocks may be marginally inaccurate, and/or Elazouni himself may simply be estimating times.

Notably, given the opportunity to proffer such an argument by cross-examining Elazouni at the March 28 hearing, the BIE, for whatever reason, chose not to do so (HT 33 et seq). Likewise, the BIE chose not to confront Elazouni with what it alleges are “probative” photographs.

By attempting to circumvent the ALJ's ruling here, as well as by introducing arguments after a hearing process where it failed to do so, the BIE is also attempting to circumvent any notion of Procedural Due Process on the part of Capital City. While same is limited in PUC cases, it does attach when a property or liberty right is compromised **Davenport v. Reed, 785 A.2d 1058, 1062 (Pa. Cmwlth. 2001)** Certificates of public convenience have attributes of pecuniary value and transferability and therefore constitute property or a right to property (subject to the Federal tax lien statute). **Loma, Inc. v. Pennsylvania Public Utility Commission, 682 A.2d 424 (Pa. Cmwlth. 1996); appeal denied 698 A.2d 597 (Pa. 1997)**. The BIE here is attempting to compromise the value of Capital City's Certificate (at Commission docket A-00113875) by fining Respondent \$500. By introducing evidence after-the-fact, the BIE is blithely bypassing the Commission's Evidentiary Hearing process. Regardless of the proper placement of the burden, Elazouni's testimony showed that he, and by imputation, Capital City, behaved **in excess of 52 Pa. Code 29.313(a)**, by offering to take DeKok and his accompanying minor child to his destination despite already having loaded another passenger (HT 10 and 35).

Finally, lacking any other case to make, the BIE is engaging in unnecessary innuendo by introducing Capital City's long-term Commission Complaint record into evidence (BIE Exhibit 4) While it is noted that the PUC does not have to conform with the Pennsylvania Rules of Evidence, **Gasparro v. Public Utility Commission, 814 A.2d 1282 (Pa. Cmwlth. 2003)**, (all relevant evidence of reasonably probative value is admissible at administrative hearings), the issue is “reasonably probative value.” The BIE can point to no prior Complaint addressing the behavior of driver Elazouni, nor any policy regarding non-service on the part of Capital City. The BIE's attempt is prejudicial without being probative of the alleged violation at bar, and should be ignored.

## V CONCLUSION

In its zeal to pursue a \$500 fine against Respondent, Complainant shows a willingness to bypass Due Process, introduce evidence (or conclusions therein) well after the hearing process and closure of the record (April 23, 2016; see Initial Decision at 2), exploit log discrepancies of less than five minutes, and use mere innuendo, all to support a case which is essentially a matter of which of two witnesses is more believable. In this matter, the Administrative Law Judge made a judgment call. For the Commission to

decide otherwise and reverse same not only strips the Office of ALJ of its power, but suggests more serious problems with more expensive and/or important cases.

## VI PRAYER FOR RELIEF

For the foregoing reasons, Respondent Capital City Cab Service requests that the Public Utility Commission dismiss Complainant's Exceptions, allowing the Initial Decision of the Administrative Law Judge on July 11, 2016 to stand.

Respectfully submitted

9/6/16

/s/ Joseph T. Sucec, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document in the above case, by first-class mail on the following:

Stephanie Wimer, Esq.  
Bureau of Investigation and Enforcement  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105

Administrative Law Judge Steven K. Haas  
PA Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105

Date: 9/6/16

/s/ Joseph T. Sucec, Esq.

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